No. 91-1833

In the Supreme Court of the United States

OCTOBER TERM, 1992

EVERETT R. RHOADES, M.D., DIRECTOR OF THE INDIAN HEALTH SERVICE, ET AL., PETITIONERS

v.

GROVER VIGIL, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1833

EVERETT R. RHOADES, M.D., DIRECTOR OF THE INDIAN HEALTH SERVICE, ET AL., PETITIONERS

v.

GROVER VIGIL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

1. Respondents defend the court of appeals' holding that there is judicially manageable "law to apply" for reviewing resource allocation decisions by the Indian Health Service (IHS), and that the IHS's allocation of funds received through lump-sum appropriations among its several statutory functions is accordingly not "committed to agency discretion by law." 5 U.S.C 701(a)(2).

a. As we explain in our opening brief (Pet. Br. 14-15), the Snyder Act and the Indian Health Care Improvement Act (IHCIA) do not provide "law" for a court "to apply" so as to permit it to review and set aside the resource allocation decision at issue in this

case. No such law can be found in the Snyder Act's general authorization for the IHS and the BIA to expend funds for the "benefit, care, and assistance of * * * Indians," 25 U.S.C 13, or in the IHCIA's general policy provisions, 25 U.S.C. 1601, 1602,[1] or in its provision authorizing "therapeutic and residential treatment centers," 25 U.S.C. 1621(a) (4)(D). Neither statute provides any guidance whatever concerning how the IHS was supposed to allocate its resources between fulfilling the needs of handicapped Indian children in the Southwest and meeting health care needs of those and other Indians elsewhere in the country. Although we may assume, *arguendo*, that the Snyder Act and the IHCIA would provide "law to apply" to the extent of permitting a court to review a decision by the IHS to spend funds on a purpose *not* authorized by either statute (*e.g.*, to establish a health program for non-Indians),[2] those statutes provide no standard for determining how the IHS was to allocate its resources among authorized purposes for the benefit of Indians.[3]

---

[1] Cf. *Pennhurst State School* v. *Halderman*, 451 U.S. 1, 19 (1981) (A "general statement of 'findings' * * * is too thin a reed to support * * * rights and obligations read into it.").

[2] There could be no serious contention that the purpose to which the funds previously allocated to the ICP were reallocated—to provide technical assistance and consulting services to IHS components on a nationwide basis—is not authorized by the Snyder Act or the IHCIA.

[3] Contrary to respondents' contention (Br. 34-36), the ICP could not in any event have been mandated by the IHCIA's authorization for "residential treatment centers," since the Indian Children's Project (ICP) included no such centers. See Pet. 6-7. As the court of appeals observed, the program was "created at the discretion of the IHS," not to fulfill any statutory mandate. Pet. App. 11a.

In an effort to overcome the generality of the statutory text, respondents assert (Br. 32) that laws "must be interpreted in such a way as to favor, rather than restrict, judicial review under the APA" because "[s]tatutes enacted to benefit Indians must be liberally construed in their favor." While this Court has long held that "statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed [with] doubtful expressions being resolved in favor of the Indians," *Alaska Pac. Fisheries* v. *United States*, 248 U.S. 78, 89 (1918), that canon of construction does not aid respondents here for two reasons.

First, that canon does not give rise to a special rule permitting judicial review in the Indian context of governmental actions or funding decisions that would otherwise not be subject to judicial review. To the contrary, governmental matters affecting Indians have traditionally been regarded as *less* amenable to judicial oversight. See, *e.g.*, *Delaware Tribal Business Comm.* v. *Weeks*, 430 U.S. 73, 84-85 (1977); see also *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 411-416 & n.28 (1980); *Baker* v. *Carr*, 369 U.S. 186, 215-216 (1962); cf. *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649, 655-656 (1976).

Second, there is in any event no ambiguity in the statutes involved with respect to the issue here: the statutes are unambiguously broad, general, and devoid of standards that might guide a court in reviewing the IHS's decisions concerning the allocation of appropri-

ated funds among authorized purposes—and therefore are precisely the sort of statutes that commit the matters they encompass to agency discretion. Accordingly, a directive to construe either the Snyder Act or the IHCIA "in favor of the Indians" would still leave a reviewing court with no judicially manageable standard for determining the appropriateness of the IHS's decision to reallocate funds from the ICP, which benefits Indian children in the Southwest, to benefit Indians in communities across the nation.

b. Respondents' attempt (Br. 41-42, 45) to find law to apply in the IHS's regulations also fails. The regulations cited by respondents provide that the IHS services offered at any location depend on the "financial and personnel resources made available," 42 C.F.R. 36.11(c) (1986), and that priorities for care and treatment are "determined on the basis of relative medical need and access to other arrangements." 42 C.F.R. 36.12(c). Respondents contend that those regulations provide a standard by which a court may assess a claim that the agency ought to have allocated its resources differently among authorized purposes. Specifically, they argue (Br. 42) that a court should "assess[] * * * the need for care and treatment, the urgency of this need, and the actual availability of other resources to provide this care and treatment." Presumably, the court would also have to perform the same assessments for all competing uses of the same resources. The mere statement of the factors involved and judgments to be made is sufficient to demonstrate that the task of allocating scarce agency funds is a matter for the expert agency that Congress has charged with administering the Indian Health program, not the courts.

Not surprisingly, as we explained in our opening brief (Pet. Br. 24-26), both this Court and the lower federal courts have uniformly held that resource allocation decisions are committed to agency discretion because "they involve the inherently subjective weighing of the large number of varied priorities which combine to dictate the wisest dissemination of an agency's limited budget." *Community Action of Laramie County, Inc.* v. *Bowen*, 866 F.2d 347, 354 (10th Cir. 1989). This Court should not accept respondents' invitation to turn the federal courts into health care administrators.

c. The IHS Manual provisions relied on by respondents (Br. 42-43) do not mandate or even mention the ICP, and plainly do not provide law to apply to the agency decision to terminate the ICP. The regulation that describes the IHS Manual, 42 C.F.R. 36.3 (1986), explains that it consists only of operating procedures to assist officers and employees in carrying out their responsibilities. The regulation further explains that those operating procedures "are not regulations establishing program requirements which are binding upon members of the general public." *Ibid.*[4]

[4] Although the Court referred to the BIA manual in *Morton* v. *Ruiz*, 415 U.S. 199 (1974), it did so for a purpose that is precisely the opposite of that invoked by respondents here. The Court in *Ruiz refused* to give deference to a BIA eligibility requirement that was published in the BIA manual, at least in part because the Manual was, "by BIA's own admission, solely an internal-operations brochure intended to cover policies that 'do not relate to the public.'" 415 U.S. at 235.

Significantly—despite respondents' urging—neither the district court nor the court of appeals held that the IHS Manual provisions furnish law to apply in this case.

d. Respondents argue (Br. 37-41) that "agency representations to Congress" and "administrative policy" provide law to apply in this case, and cite *Morton* v. *Ruiz*, 415 U.S. 199 (1974), as support for that proposition. In *Morton* v. *Ruiz*, this Court treated as significant the fact that BIA had indicated in appropriations hearings that Indians living near, but not on, a reservation were eligible for BIA Services. *Id.* at 214. The Court, however, did not treat those representations as binding law or otherwise hold that they controlled the BIA's exercise of discretion. Instead, the Court relied on those representations, along with other indications of legislative intent, to illuminate ambiguous statutory language regarding an issue—eligibility requirements for certain BIA benefits—that had never been regarded as committed to agency discretion by law. See *id.* at 210-230. In this case, by contrast, respondents do not rely on statements in congressional testimony as an aid to construing statutory language; they instead seek to elevate such statements to the status of law in themselves—as a *substitute* for statutory language—to govern the IHS's resource allocation decisions.[5]

[5] In *McNabb* v. *Bowen*, 829 F.2d 787 (9th Cir. 1987), as in *Morton* v. *Ruiz*, the Ninth Circuit used agency statements and congressional committee reports to assist in clarifying a statutory ambiguity: whether the IHS could require Indians to seek help from state agencies before making use of IHS services. That is not analogous to using similar materials to

Neither agency statements to Congress nor committee reports, however, constitute legally binding authority. Cf. *INS* v. *Chadha*, 462 U.S. 919 (1983); *International Union, UAW* v. *Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984) (Scalia, J.), cert. denied, 474 U.S. 825 (1985).[6]

Respondents also err in contending (Br. 39-40) that the government's administrative "policy of providing handicapped Indian children with direct evaluation and treatment services" provides law that a court may apply to review and set aside the IHS decision. There was no such "policy." The ICP was a pilot program that provided services for a few years to Indian children only in a few southwestern States. By contrast, the administrative policy that four Members of this Court suggested might provide law to apply in *Franklin* v. *Massachusetts*, 112 S. Ct. 2767 (1992), cited by respondents (Br. 31, 40), had guided the Secretary's exercise of discretion since 1790, and

impose legally binding obligations on an agency concerning how to allocate its resources among various statutorily authorized purposes.

[6] Amici Six American Indian Tribes *et al.* assert (Br. 10-21) that *Donovan* is distinguishable because this case involves the special relationship between the federal government and Indian tribes and because the legislative history in *Donovan* is asserted to be less clear than that relied on here. As we explained in our opening brief (Pet. Br. 21-24), however, the special relationship between the United States and Indian tribes possesses no independent legal force that would furnish a basis for judicial review of agency allocation decisions. And the holding in *Donovan* that legislative history does not provide law to apply was not based on the quantity or clarity of the documents cited to the court in that case. 746 F.2d at 860-861.

the case for reviewability was bolstered, in the view of those Justices, by the special role of the census in preserving the Nation's commitment to a democratic form of government. See 112 S. Ct. at 2785 (Stevens, J., concurring in part and concurring in the judgment) (discussing the "usual residence" rule). More importantly, however, the concurring opinion in *Franklin* v. *Massachusetts* did not rely on the existence of the administrative policy standing alone; it found law to apply in the "overall statutory scheme," specifically noting that "the Secretary's discretion is constrained by the requirement that she produce a tabulation of the 'whole number of persons in each State.' 2 U.S.C. 2a." 112 S. Ct. at 2785. Thus, the administrative policy (the "usual residence" rule) involved in *Franklin* v. *Massachusetts* served as a source of guidance in determining which persons could be regarded as "in" each State within the meaning of the governing statute, 112 S. Ct. at 2785 n.20 (Stevens, J., concurring in part and concurring in the judgment), and the Constitution, *id.* at 2777-2778 (majority opinion). Here, by contrast, the IHS's funding of the ICP for a period of time furnishes no guidance to a court in construing either the Snyder Act or the IHCIA for purposes of reviewing the IHS's decision to reallocate appropriated funds from the ICP to another purpose that is equally authorized by those Acts.

Petitioners' claim concerning the IHS's "policy" in fact reduces to the contention that, once an agency has decided to allocate its resources in a certain way, it must continue to do so—or at least be prepared to justify to a court any change it makes. That claim is

inconsistent with the numerous cases holding that resource allocation decisions of the sort involved here are committed to agency discretion by law. See Pet. Br. 24-25 & n.16.

Nor does the D.C. Circuit's opinion in *Robbins* v. *Reagan*, 780 F.2d 37 (1985), aid respondents. See Resp. Br. 39. In that case, the court found that it could review an agency's decision to close a homeless shelter, because the plaintiff alleged that the agency decision stemmed from an impermissible factor—animosity toward a homelessness advocacy group. *Id.* at 47. The court held that the question of whether there exists law to apply "focuses on the particular allegations of the plaintiff." *Ibid.* Here, by contrast, the respondents have never alleged that the IHS decision was based on impermissible or irrelevant factors.[7]

e. Finally, respondents contend (Br. 43-44) that a "trust" relationship applies to the "provision of

---

[7] Respondents do contend (Br. 44-45), for the first time, that the IHS decision to terminate the ICP was based on an "unjustified factual assumption that alternative sources" of services would be available and that this assumption provides a "basis for judicial review." The record shows that the regional ICP was ended in order to allocate its resources to a program that would benefit children nationwide. Pet. App. 20a; J.A. 72, 77, 80, 90. While the alternative resources available to respondents would be one factor relevant to the decision, the decision was made on the basis of a variety of other considerations as well. Thus, even if the agency had underestimated the availability of alternative sources of health care—and we do not believe that it did—that fact alone would not provide a "meaningful standard against which to judge the agency's exercise of discretion." *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985).

health care," and that that trust relationship justifies judicial review of the IHS's resource allocation decisions. In our opening brief, we explained (Pet. Br. 21-24) that the government's trust duty to Indians is implicated only where Indian property or Indian funds are at stake, and that the contours of the relationship are supplied by the statutes and regulations relevant to the property at issue.[8]

Respondents rely (Br. 43-44) on the Congressional findings provision of the IHCIA for the proposition that a trust responsibility applies to the provision of

[8] Amici NCAI, *et al.*, contend (Br. 8) that two of the cases we cite for this proposition–*Scholder* v. *United States*, 428 F.2d 1123 (9th Cir.), cert. denied, 400 U.S. 942 (1970), and *Quick Bear* v. *Leupp*, 210 U.S. 50, 80-81 (1908)—"are easily distinguished from the present case" because most contemporary Indian health and education programs are funded through general appropriations and not treaty funds. That argument misses the point. General appropriations are not Indian tribal trust funds to which a trust relationship attaches. Trust funds are monies that belong to the tribe and are derived from the sale of tribal resources, from treaties, from the proceeds of tribal labor, and from claim judgments rendered against the United States. See Newton, *Indian Tribal Trust Funds*, 27 Hastings L. J. 519, 522 (1975). The fact that many services are now provided by general appropriation instead of by treaty right does not alter the fact that there is a difference between public monies and tribal funds managed by the United States as trustee. *Scholder*, 428 F.2d at 1129. As a result, far from supporting a special rule of judicial review in this setting, the fact that federal services to Indians now are funded out of the same type of lump-sum appropriations that fund the operation of the government generally supports our position that here, just as in the case of programs not involving Indians, the allocation of lump sum appropriations among authorized agency programs is committed to agency discretion by law.

health care. Rather than providing "trust" law to apply, however, the provisions of the IHCIA quoted by the respondents illustrate a point we made in our opening brief. See Pet. Br. 23. In enacting the IHCIA and the Snyder Act (and annual appropriations authorized by those Acts)—and in vesting broad discretion in the IHS and BIA—Congress articulated its view of both the nature of the "special relationship" between the United States and Indians in this context and the manner in which that relationship should be carried out. Thus, although the "special relationship" may have provided the rationale for Congress's decision to provide for Indian health care, it does not furnish an independent, extra-statutory basis for imposing legal constraints on the IHS's allocation of resources among various Indian health needs. See Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 Stan. L. Rev. 1213, 1246 (1975). Indeed, respondents all but concede this fact through their failure to explain precisely what constraints the "trust" responsibility they invoke might impose on the IHS.

Amici Six American Indian Tribes, *et al.*, contend (Br. 11-13) that the "trust" responsibility is not limited to the administration of trust property. In support of that proposition, amici cite statements in *Pyramid Lake Paiute Tribe of Indians* v. *United States Dep't of the Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990) ("trustee obligations apparently are not limited to property"), and in R. Strickland, *et al.*, *Felix S. Cohen's Handbook of Federal Indian Law* 226 (1982) [hereafter *Handbook*] ("Court decisions have also held that the ordinary standards of a private fiduciary

must be adhered to by executive officials administering Indian property or federal programs"). In turn, both sources cite this Court's decision in *Morton* v. *Ruiz*. As we explain below and in our opening brief (Pet. Br. 37-38), the actual holding in *Ruiz* does not support such a remarkable expansion of the "trust" responsibility. If read to embody respondent's conclusion, *Ruiz* would be inconsistent with this Court's later decisions in *United States* v. *Mitchell*, 463 U.S. 206, 224 (1983), and *United States* v. *Cherokee Nation of Oklahoma*, 480 U.S. 700, 707-708 (1987).[9]

2.a. In our opening brief (Pet. Br. 29-34), we demonstrated that under this Court's decision in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), agency decisions concerning the discretionary allocation of funds are not subject to the procedural requirements that govern promulgation of legislative rules.[10] Respondents assert (Br. 25) that

[9] Indeed, the statement from the *Handbook* cited by respondents appears to be wholly derived not from the language of *Ruiz* itself, but from Professor Davis's analysis of the case in an article published shortly after the decision. See *Handbook* 225 n.78 (discussing Davis, *Administrative Law Surprises in the Ruiz Case*, 75 Colum. L. Rev. 823 (1975)). That article likewise predated this Court's decisions in *Mitchell* and *Cherokee Nation*.

[10] Respondents' discussion (Br. 19-24) of the differences between "interpretative" and "substantive" rules is of little consequence in this case. As we noted in our opening brief (at 33 n.19), the government did not argue in the court of appeals that the IHS's resource allocation decision was an "interpretative" rule that was, on that basis, exempt from APA notice-and-comment rulemaking procedures. See 5 U.S.C. 553(b)(3)(A).

the instant case differs from *Overton Park* because the IHS decision—unlike the decision at issue in *Overton Park*—involved a change in general "eligibility rules." Specifically, respondents assert (Br. 6, 23) that an informational brochure "promulgated eligibility criteria" concerning "who [was] eligible for ICP services."

Respondents' assertion is mistaken. The brochure relied on by respondents merely explained that the ICP was a "regional * * * evaluation, treatment planning, consultation and training program" that would "see any IHS or BIA/OIEP [Office of Indian Education Programs] eligible child." Pet. Reply Br. App. 1a (Certiorari Stage). The brochure was designed "to help people in the regional referral area understand the functioning of the ICP," *ibid.*, and not to "promulgate" eligibility rules. Rather than creating new eligibility standards, the brochure simply referred the reader to existing standards governing eligibility for IHS services generally. *Ibid.*

More generally, respondents suggest (Br. 23-24) that the decision to terminate the ICP was in some sense a modification of "eligibility criteria" for ICP programs. However, the standards governing eligibility for IHS programs (including the ICP), see 42 C.F.R. 36.12 (1986), were not affected either by the decision to begin the ICP as a pilot project or to terminate it and reallocate funds to other purposes.[11]

[11] Thus, respondents' reliance (Br. 23) on *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), is misplaced. That case requires that an agency's repudiation or rescision of an extant rule must go through notice and comment rulemaking. See also *Homemakers North*

As a result, the Indian children who participated in the ICP program remained eligible for IHS health care services after the program was terminated. Although the IHS regularly alters the mix of health services offered at given locations—as its regulations provide, see 42 C.F.R. 36.11(c) (1986)—each such decision does not redefine "eligibility criteria" for receipt of IHS services.

Nor does each IHS decision altering the mix of available health services at a particular location constitute a "rule" under the APA in any other respect. Respondents essentially argue that the facts that the IHS decision reallocating funds from the ICP was communicated in verbal form and that it had an impact on the participants in the program were sufficient to bring it within the APA definition of "rule." Under the APA, however, "a rule is a statement that has *legal* consequences" in the future because it "deals with what the law will be." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 218-219 (1988) (Scalia, J., concurring) (emphasis added). In this case, it was the reallocation of resources itself—not any verbal statements the IHS made—that had a future effect, and that reallocation did not prescribe or affect any legal rights or duties of either the IHS or respondents. See Pet. Br. 30-31. Under any other view, virtually everything an agency does would be a rule. See Pet. Br. 32-33. Respondents do not deny

---

Shore, Inc. v. *Bowen*, 832 F.2d 408, 412 (7th Cir. 1987). Neither the creation nor the termination of the ICP constituted rulemaking, and the Court's holding in *Motor Vehicle Mfrs. Ass'n* is thus not implicated here.

that that would be the effect of adopting their open-ended interpretation.

b. Respondents argue (Br. 27-28) that this Court's decision in *Morton* v. *Ruiz*, coupled with the concept of the government's "special relationship to Indians," imposes a special procedural requirement on the government to engage in notice-and-comment procedures before terminating services to Indians. As we explained in our opening brief, however, the decision in *Ruiz* cannot be taken to stand for such a broad principle. See Pet. Br. 37-38. To do so would disregard the crucial fact in the *Ruiz* decision—that the agency's own rules required it to publish its eligibility requirements. It would also disregard this Court's later decision in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549 (1978). *Vermont Yankee* made clear that a court's duty in reviewing agency procedures is simply to determine whether the agency has complied with the applicable statutes and regulations, not to impose special procedural requirements on the agency based on the court's own notions of what procedures would be most desirable.

Respondents assert that this case is not subject to the rule of *Vermont Yankee*, because it presents "extremely compelling circumstances." See Br. 18 (quoting 435 U.S. at 543). The decision to terminate the ICP, however, falls well short of the "extremely rare," 435 U.S. at 524, situation in which a court might permissibly fashion procedural constraints on agency action that are not required by statute or regulation. The agency decision at issue was not a "quasi-judicial determination by which a very small

number of persons [were] exceptionally affected, in each case upon individual grounds." *Vermont Yankee*, 435 U.S. at 542 internal quotation marks omitted). Imposition of rulemaking procedures in the instant case would only interfere with the prompt provision of health care to Indian communities throughout the nation. If "compelling circumstances" mandate rulemaking in this case, they would also compel rulemaking whenever the IHS reallocates its staff or varies the procedures and equipment made available to any of its 50 hospitals, 158 health centers, or 300 health stations. The net result could only be delay in the allocation of scarce resources while courts attempt to micromanage health care delivery.

Despite respondents' claims (Br. 26), the "good cause" exception to APA notice-and-comment rulemaking, see 5 U.S.C. 553(b)(3)(B), would not mitigate the adverse effects of this delay. First, as we show in our opening brief (Br. 31-34), agency resource allocation decisions are simply not rules. Therefore, the APA's rulemaking requirements, as well as the exceptions thereto, do not apply. Second, the "good cause" exception is applied narrowly. See, *e.g.*, *Action on Smoking and Health* v. *CAB*, 713 F.2d 795, 800 (D.C. Cir. 1983). Were the IHS to apply that exception to the myriad decisions it must make in allocating its health care and delivery resources, however, there would be little basis for distinguishing those that could be implemented under the "good cause" exception from those that could not, and the exception might quickly swallow the rule. Moreover, litigation concerning the applicability of the exception in particular cases would in itself disrupt the efficient operation of the IHS's programs.

3. Respondents contend (Resp. Br. 28-29) that the relief granted below must be affirmed on the basis of what they assert to be the district court's unappealed holding that the agency's decision to terminate the ICP was a "statement[] of general policy" that the agency did not publish in accordance with the requirements of 5 U.S.C. 552(a)(1).

Respondents advanced a similar argument in their brief in opposition (at 6). As we explained in our Reply Brief at the certiorari stage (at 2-3), the district court's ruling that the decision to terminate the ICP was invalid under 5 U.S.C. 552 would not provide an independent ground on which to affirm the judgment below. That ruling rested entirely on the district court's prior determination that the decision was a "rule" subject to Section 553's notice-and-comment procedures. See Pet. App. 41a ("[t]he centrally relevant finding here has already been made with respect to the rulemaking requirements of § 553"). Indeed, the district court expressly held (Pet. App. 38a) that the IHS decision did not come within the exception to notice-and-comment rulemaking requirements for "general statements of policy." 5 U.S.C. 553(b)(3)(A). And the respondents have never alleged that the decision was anything other than a rule. See J.A. 14-15; Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment 28-31.

Had the court of appeals agreed with petitioners that the termination decision was not a rule at all, it would have been required to reverse the district

court's judgment, including its finding of a Section 552 violation. Since the district court's Section 552 ruling rests on the same erroneous premise that led both courts below to impose notice-and-comment procedures, Section 552 does not provide an independent basis for affirming the judgment below.

For the foregoing reasons, and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

WILLIAM C. BRYSON
Acting Solicitor General

JANUARY 1993